



To the Honorable Council
City of Norfolk, Virginia

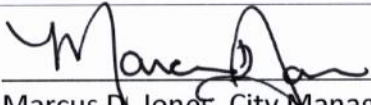
March 22, 2016

From: Charles E. Rigney, Sr., Director of Development

Subject: An ordinance authorizing the City Manager to enter into a Performance Agreement with the Economic Development Authority of the City of Norfolk and Colonna's Ship Yard, Incorporated

Reviewed: 
Peter H. Chapman, Deputy City Manager

Ward/Superward: 4/7

Approved: 
Marcus D. Jones, City Manager

Item Number:

R-4

I. **Recommendation** Adopt Ordinance

II. **Applicant** Economic Development Authority ("EDA") of the City of Norfolk

III. **Description**

The City of Norfolk (the "city") has been awarded a grant of, and expects to receive, \$200,000.00 from the Commonwealth's Development Opportunity Fund ("COF Grant") through the Virginia Economic Development Partnership ("VEDP") for the purpose of inducing Colonna's Ship Yard, Incorporated ("Colonna's") to make capital improvements. Colonna's will be making a significant capital investment and creating and maintaining a significant number of new jobs, as such capitalized terms are defined in the Performance Agreement.

IV. **Analysis**

- VEDP is willing to provide the COF Grand funds to the EDA with the expectation that the EDA will provide the funds to Colonna's, provided they met certain criteria relating to capital investment and new jobs maintenance and the city.

V. **Financial Impact**

Colonna's capital improvements will total at least \$34,250,000.00 and create and maintain at least 51 new jobs.

VI. Environmental
N/A

VII. Community Outreach/Notification
Public notification for this agenda item was conducted through the city's agenda notification process.

VIII. Board/Commission Action
N/A

IX. Coordination/Outreach
This letter and ordinance have been coordinated with the Department of Development, City Attorney's Office, Department of Neighborhood Development and the City Manager's office.

Supporting Material from the Department of Development:

- Ordinance
- Performance Agreement

3/2/2016mf

Form and Correctness Approved: 

By Michelle G. Foy
Office of the City Attorney

NORFOLK, VIRGINIA

Contents Approved:

By 
DEPT. Development

ORDINANCE No.

AN ORDINANCE AUTHORIZING THE CITY TO ENTER INTO A PERFORMANCE AGREEMENT WITH THE ECONOMIC DEVELOPMENT AUTHORITY OF THE CITY OF NORFOLK AND COLONNA'S SHIP YARD, INCORPORATED.

- - -

WHEREAS, the City of Norfolk (the "Locality") expects to, receive \$200,000.00 from the Commonwealth's Development Opportunity Fund (a "COF Grant") through the Virginia Economic Development Partnership ("VEDP") for the purpose of inducing Colonna's Ship Yard, Incorporated (the "Company") to make capital improvements, including constructing a dry dock and dredging and improving the channel and bulkhead, to its ship repair facility in the Locality (the "Facility"), thereby making a significant Capital Investment, and creating and Maintaining a significant number of New Jobs, as such capitalized terms are defined in the Performance Agreement attached hereto; and

WHEREAS, VEDP is willing to provide the COF Grant funds to the Economic Development Authority of the City of Norfolk (the "Authority") with the expectation that the Authority will provide the funds to the Company, provided that the Company promises to

meet certain criteria relating to Capital Investment and New Jobs and the Locality provides a comparable local incentive; and

WHEREAS, the Locality, the Authority, and the Company desire to set forth their understanding and agreement as to the payout of the COF Grant, the use of the COF Grant proceeds, the obligations of the Company regarding Capital Investment and New Job creation and Maintenance, and the repayment by the Company of all or part of the COF Grant and all or part of the required local incentive under certain circumstances; and

WHEREAS, the Company has stated that the capital improvements to the Facility will entail a capital expenditure by or on behalf of the Company of approximately \$34,250,000.00; and

WHEREAS, the Company has stated that the capital improvements to the Facility will further entail the creation and Maintenance of 51 New Jobs at the Facility; and

WHEREAS, the stimulation of the additional tax revenue and economic activity to be generated by the Capital Investment and New Jobs constitutes a valid public purpose for the expenditure of public funds and is the animating purpose for the COF Grant; now, therefore

BE IT ORDAINED by the Council of the City of Norfolk:

Section 1:- That the Performance Agreement between Colonna's Ship Yard, Incorporated, the Economic Development Authority of the City of Norfolk, and the City of Norfolk, a copy of which is attached hereto, wherein the City of Norfolk agrees to the terms and

conditions of the payout of the COF Grant, the use of the COF Grant proceeds, the obligations of Colonna's Ship Yard, Incorporated, regarding Capital Investment and New Job creation, as such terms are defined in the Performance Agreement, and the repayment by Colonna's Ship Yard, Incorporated under certain circumstances of all or part of the COF Grant and all or part of the required local incentive to be provided by the City, is hereby approved.

Section 2:- That the City Manager is authorized to correct, amend, or revise the Performance Agreement as he may deem necessary in order to carry out the intent of the Council and to execute the Performance Agreement, as corrected, amended, or revised in accordance herewith, for and on behalf of the City, subject however to approval as to form and correctness by the Office of the City Attorney.

Section 3:- That this ordinance shall be in effect as of the date of its adoption.

COMMONWEALTH'S DEVELOPMENT OPPORTUNITY FUND

PERFORMANCE AGREEMENT

This **PERFORMANCE AGREEMENT** made and entered this ____ day of _____, 2016, by and among **COLONNA'S SHIP YARD, INCORPORATED** (the "Company"), a Virginia corporation, the **ECONOMIC DEVELOPMENT AUTHORITY OF THE CITY OF NORFOLK** (the "Authority"), a political subdivision of the Commonwealth of Virginia (the "Commonwealth"), and the **CITY OF NORFOLK, VIRGINIA** (the "Locality"), a municipal corporation of the Commonwealth.

WITNESSETH:

WHEREAS, the Locality has been awarded a grant of, and expects to, receive \$200,000 from the Commonwealth's Development Opportunity Fund (a "COF Grant") through the Virginia Economic Development Partnership Authority ("VEDP") for the purpose of inducing the Company to make capital improvements, including constructing a dry dock and dredging and improving the channel and bulkhead, to its ship repair facility in the Locality (the "Facility"), thereby making a significant Capital Investment, and creating and Maintaining a significant number of New Jobs, as such capitalized terms are hereinafter defined;

WHEREAS, VEDP is willing to provide the COF Grant funds to the Authority with the expectation that the Authority will provide the funds to the Company, provided that the Company promises to meet certain criteria relating to Capital Investment and New Jobs and the Locality provides a comparable local incentive;

WHEREAS, the Locality, the Authority, and the Company desire to set forth their understanding and agreement as to the payout of the COF Grant, the use of the COF Grant proceeds, the obligations of the Company regarding Capital Investment and New Job creation and Maintenance, and the repayment by the Company of all or part of the COF Grant and all or part of the local incentive to be provided by the Locality under certain circumstances;

WHEREAS, the Company has stated that the capital improvements to the Facility will entail a capital expenditure by or on behalf of the Company of approximately \$34,250,000;

WHEREAS, the Company has stated that the capital improvements to the Facility will further entail the creation and Maintenance of 51 New Jobs at the Facility; and

WHEREAS, the stimulation of the additional tax revenue and economic activity to be generated by the Capital Investment and New Jobs constitutes a valid public purpose for the expenditure of public funds and is the animating purpose for the COF Grant:

NOW, THEREFORE, in consideration of the foregoing, the mutual benefits, promises and undertakings of the parties to this Agreement, and other good and valuable consideration, the

receipt and sufficiency of which are hereby acknowledged, the parties covenant and agree as follows.

Section 1. Definitions.

For the purposes of this Agreement, the following terms shall have the following definitions:

“Capital Investment” means a capital expenditure by or on behalf of the Company in taxable real property, taxable tangible personal property, or both, at the Facility. The Capital Investment must be in capital improvements to the Facility on and after October 1, 2015 through the Performance Date. The purchase or lease of furniture, fixtures, machinery and equipment, including under an operating lease or any purchase under a capital lease, and construction and up-fit by or on behalf of the Company, will qualify as Capital Investment.

“Maintain” means that the New Jobs will continue without interruption from the date of creation through the Performance Date. Positions for the New Jobs will be treated as Maintained during periods in which such positions are not filled due to (i) temporary reductions in the Company’s employment levels (so long as there is active recruitment for open positions), (ii) strikes, and (iii) other temporary work stoppages.

“New Job” means new permanent full-time employment of an indefinite duration at the Facility for which the standard fringe benefits are provided by the Company for the employee, and for which the Company pays an average annual wage of at least \$46,072. Each New Job must require a minimum of either (i) 35 hours of an employee’s time per week for the entire normal year of the Company’s operations, which “normal year” must consist of at least 48 weeks, or (ii) 1,680 hours per year. Seasonal or temporary positions, positions created when a job function is shifted from an existing location in the Commonwealth, and positions with construction contractors, vendors, suppliers and similar multiplier or spin-off jobs shall not qualify as New Jobs. The New Jobs must be in addition to the 688 full-time jobs at the Facility as of October 1, 2015.

“Performance Date” means March 31, 2019. If the Locality, in consultation with the Authority and VEDP, deems that good faith and reasonable efforts have been made and are being made by the Company to achieve the Targets, the Locality may agree to extend the Performance Date by up to 15 months. If the Performance Date is extended, the Locality shall send written notice of the extension to the Authority, the Company, and VEDP, and the date to which the Performance Date has been extended shall be the “Performance Date” for the purposes of this Agreement.

“Targets” means the Company’s obligations to make Capital Investments at the Facility of at least \$34,250,000 and to create and Maintain at least 51 New Jobs at the Facility, all as of the Performance Date.

“Virginia Code” means the Code of Virginia of 1950, as amended.

Section 2. Targets; Statutory Criteria.

The Company will expand, equip, improve, and operate the Facility in the Locality, make a Capital Investment of at least \$34,250,000.00, and create and Maintain at least 51 New Jobs at the Facility, all as of the Performance Date.

The Locality and the Authority hereby strongly encourage the Company to ensure that at least 30% of the New Jobs are offered to “Residents” of the Commonwealth, as defined in Virginia Code Section 58.1-302. In pertinent part, that definition includes natural persons domiciled in Virginia or natural persons who, for an aggregate of more than 183 days of the year, maintained a place of abode within the Commonwealth, whether domiciled in the Commonwealth or not.

The average annual wage of the New Jobs of at least \$46,072 is less than the prevailing average annual wage in the Locality of \$49,548, but is more than 85% of that prevailing average annual wage (\$42,116). The Locality is a high-unemployment locality, with an unemployment rate for 2014, which is the last year for which such data is available, of 6.4% as compared to the 2014 statewide unemployment rate of 5.2%. The Locality is a high-poverty locality, with a poverty rate for 2014, which is the last year for which such data is available, of 23.4% as compared to the 2014 statewide poverty rate of 11.8%.

Section 3. Disbursement of COF Grant.

By no later than March 31, 2016, the Locality will request from VEDP the disbursement to the Authority of the COF Grant. If not so requested by the Locality by March 31, 2016, this Agreement will terminate. The Locality and the Company will be entitled to reapply for a COF Grant thereafter, based upon the terms, conditions and availability of funds at that time.

The COF Grant in the amount of \$200,000 is expected to be paid promptly by VEDP to the Authority. Within 30 days of its receipt of the COF Grant proceeds, the Authority will disburse the COF Grant proceeds to the Company as an inducement to the Company to achieve the Targets at the Facility. The COF Grant proceeds will be used for any purpose permitted by Section 2.2-115(D) of the Virginia Code.

Section 4. Break-Even Point; State and Local Incentives.

(a) *Commonwealth-Level Incentives:* VEDP has estimated that the Commonwealth will reach its “break-even point” by the Performance Date. The break-even point compares new revenues realized as a result of the Capital Investment and New Jobs at the Facility with the Commonwealth’s expenditures on incentives, including but not limited to the COF Grant. With regard to the Facility, the Commonwealth expects to provide incentives in the following amounts:

<u>Category of Incentive:</u>	<u>Total Amount</u>
COF Grant	\$200,000

Virginia Jobs Investment Program ("VJIP") (Estimated)	50,400
Enterprise Zone Job Creation Grant ("E. Z. Job Creation Grant") (Estimated)	68,000
Virginia Investment Partnership Grant ("VIP Grant") (Estimated)	250,000

The proceeds of the COF Grant shall be used for the purposes described in Section 3. The VJIP proceeds shall be used by the Company to pay or reimburse itself for recruitment and training costs. The E. Z. Job Creation Grant and the VIP Grant proceeds may be used by the Company for any lawful purpose.

(b) *Locality-Level Incentives:* The Locality will provide the following incentive, as a matching grant or otherwise, for the Facility:

<u>Category of Incentive:</u>	<u>Total Amount</u>
Local Enterprise Zone Benefits	\$200,000

If, by the Performance Date, the proceeds from the Local Enterprise Zone Benefits disbursed or committed to be disbursed by the Locality to the Company total less than the \$200,000 COF Grant local match requirement, the Locality, subject to appropriation, will make an additional grant to the Company of the difference at the Performance Date in lieu of the remaining portion of the Local Enterprise Zone Benefits, so long as the Company has met its Targets (the "Additional Grant").

The proceeds from the Local Enterprise Zone Benefits may be used by the Company for any lawful purpose.

Section 5. Repayment Obligation.

(a) *If Statutory Minimum Eligibility Requirements are Not Met:* Section 2.2-115 of the Virginia Code requires that the Company make a Capital Investment of at least \$1,500,000 in the Facility and create and Maintain at least 15 New Jobs at the Facility in order to be eligible for the COF Grant. Failure by the Company to meet either of these statutory minimum eligibility requirements by the Performance Date shall constitute a breach of this Agreement and the entire COF Grant and Real Estate Grant must be repaid by the Company to the Authority.

(b) *If Statutory Minimum Eligibility Requirements are Met:* The provisions of this subsection (b) shall become applicable only if the Company has met the statutory minimum eligibility requirements set forth in subsection (a). For purposes of repayment, the COF Grant is to be allocated as \$100,000 (50%) for the Company's Capital Investment Target and \$100,000 (50%) for its New Jobs Target. If the Company has met at least 90% of both of the Targets at the Performance Date, then and thereafter the Company is no longer obligated to repay any portion the COF Grant or the Local Enterprise Zone Benefits. If the Company has not met at least 90% of either or both of its Targets at the Performance Date, the Company shall (i) repay to the Authority that part of the COF Grant that is proportional to the Target or Targets for which there

is a shortfall and (ii) repay to the Locality that part of the Local Enterprise Zone Benefits that is proportional to the Target or Targets for which there is a shortfall and the Company shall not be entitled to receive any Additional Grant. For example, if at the Performance Date, the Capital Investment is only \$25,687,500 (reflecting achievement of 75% of the Capital Investment Target) and only 38 New Jobs have been created and Maintained (reflecting achievement of 75% of the New Jobs Target), the Company shall repay to the Authority 25% of the moneys allocated to the Capital Investment Target (\$25,000) and 25% of the moneys allocated to the New Jobs Target (\$25,000) and shall repay to the Locality 25% of the value of the Local Enterprise Zone Benefits realized as of the Performance Date.

(c) *Determination of Inability to Comply:* If the Locality, the Authority, or VEDP shall determine at any time prior to the Performance Date (a "Determination Date") that the Company is unable or unwilling to meet and Maintain its Targets by and through the Performance Date, and if the Locality, the Authority, or VEDP shall have promptly notified the Company of such determination, the Company must repay the entire COF Grant to the Authority and must repay the value of the Local Enterprise Zone Benefits received to date to the Locality (and the Company shall not be entitled to receive any Additional Grant). Such a determination will be based on such circumstances as a filing by or on behalf of the Company under Chapter 7 of the U.S. Bankruptcy Code, the liquidation of the Company, an abandonment of the Facility by the Company or other similar significant event that demonstrates the Company will be unable or is unwilling to satisfy the Targets for the COF Grant.

(d) *Repayment Dates:* ***The Company's repayment obligations shall be due and payable from the Company to the Authority and the Locality within ninety days of the Performance Date or the Determination Date, as applicable.*** Any COF Grant moneys repaid by the Company to the Authority hereunder shall be repaid promptly by the Authority to VEDP for redeposit into the Commonwealth's Development Opportunity Fund. The Authority shall use its best efforts to recover such funds, including legal action for breach of this Agreement. Neither the Locality nor the Authority shall have any responsibility for the repayment of any sums hereunder unless said sums have been received by the Authority from the Company.

Section 6. Company Reporting.

The Company shall provide, at the Company's expense, detailed verification reasonably satisfactory to the Locality, the Authority, and VEDP of the Company's progress toward achieving the Targets. Such progress reports will be provided annually, beginning on July 1, 2016, and on each July 1 thereafter through the Performance Date, covering the period through the prior March 31. The Company shall provide such additional information regarding the Targets as the Locality, the Authority, or VEDP may reasonably require.

With each such progress report, the Company shall report to VEDP the amount paid by the Company in the prior calendar year in Virginia corporate income tax. VEDP has represented to the Company that it considers such information to be confidential proprietary information that is exempt from public disclosure under the Virginia Freedom of Information Act and that such

information will be used by VEDP solely in calculating aggregate return on invested capital analyses for purposes of gauging the overall effectiveness of economic development incentives.

The Company hereby authorizes the Office of the Treasurer of the Locality to release to VEDP the Company's real estate tax, business personal property tax, and machinery and tools tax information. Such information shall be marked and considered confidential and proprietary and shall be used by VEDP solely for verifying satisfaction of the Capital Investment Target. If VEDP should require additional documentation or consents from the Company to access such information, the Company shall promptly provide, at the Company's expense, such additional documentation or consents as the Locality, the Authority or VEDP may request. It is hereby understood that the amount reflected on the tax information released by the Office of the Treasurer may not equal the amount reported to comply with the Capital Investment required by this Agreement.

If requested by VEDP, the Company shall provide to VEDP copies of the Company's quarterly filings with the Virginia Employment Commission covering the period from October 1, 2015, through the Performance Date.

Section 7. Notices.

Formal notices and communications between the Parties shall be given either by (i) personal delivery, (ii) delivery by a reputable document delivery service that provides a receipt showing date and time of delivery, (iii) mailing utilizing a certified or first class mail postage prepaid service of the United States Postal Service that provides a receipt showing date and time of delivery, or (iv) delivery by facsimile or electronic mail (email) with transmittal confirmation and confirmation of delivery, addressed as noted below. Notices and communications personally delivered or delivered by document delivery service shall be deemed effective upon receipt. Notices and communications mailed shall be deemed effective on the second business day following deposit in the United States mail. Notices and communications delivered by facsimile or email shall be deemed effective the next business day, not less than 24 hours, following the date of transmittal and confirmation of delivery to the intended recipient. Such written notices and communications shall be addressed to:

if to the Company, to:

Colonna's Ship Yard, Incorporated
400 E. Indian River Road
Norfolk, VA 23510
Email: rwieters@colonnaship.com
Attention: Rebecca Wieters

with a copy to:

McGuireWoods, LLP
101 W. Main Street, Suite 9000
Norfolk, VA 23510
Facsimile: (757) 640-3968
Email: jpadgett@mcguirewoods.com
Attention: John Padgett

if to the Locality, to:

City of Norfolk, Virginia

with a copy to:

City of Norfolk, Virginia

Office of the City Manager
810 Union Street, 1001 City Hall Bldg.
Norfolk, Virginia 23510
Facsimile: 757-664-4239
Attention: City Manager

City Attorney's Office
810 Union Street, 910 City Hall Bldg.
Norfolk, Virginia 23510
Facsimile: 757-664-4201
Attention: City Attorney

if to the Authority, to:

with a copy to:

Economic Development Authority of
the City of Norfolk
500 E. Main Street, Suite 1500
Norfolk, Virginia 23510
Facsimile: 757-441-2910
Email: jared.chalk@norfolk.gov
Attention: Secretary/Treasurer

Kaufman & Canoles, P. C.
150 W. Main Street, Suite 2100
Norfolk, Virginia 23510
Facsimile: 888-360-9092
Email: glconsolvo@kaufcan.com
Attention: George L. Consolvo, Esq.

if to VEDP, to:

with a copy to:

Virginia Economic Development Partnership
901 East Byrd Street, 19th Floor
Post Office Box 798 (zip: 23218-0798)
Richmond, Virginia 23219
Facsimile: 804-545-5611
Email: mbriley@yesvirginia.org
Attention: President and CEO

Virginia Economic Development Partnership
901 East Byrd Street, 19th Floor
Post Office Box 798 (zip: 23218-0798)
Richmond, Virginia 23219
Facsimile: 804-545-5611
Email: smcninch@yesvirginia.org
Attention: General Counsel

Section 8. Miscellaneous.

(a) *Entire Agreement; Amendments:* This Agreement constitutes the entire agreement among the parties hereto as to the COF Grant and may not be amended or modified, except in writing, signed by each of the parties hereto. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. The Company may not assign its rights and obligations under this Agreement without the prior written consent of the Locality, the Authority and VEDP.

(b) *Governing Law; Venue:* This Agreement is made, and is intended to be performed, in the Commonwealth and shall be construed and enforced by the laws of the Commonwealth. Jurisdiction and venue for any litigation arising out of or involving this Agreement shall lie in the Circuit Court of the City of Norfolk, Virginia and such litigation shall be brought only in such court.

(c) *Counterparts:* This Agreement may be executed in one or more counterparts, each of which shall be an original, and all of which together shall be one and the same instrument.

(d) *Severability*: If any provision of this Agreement is determined to be unenforceable, invalid or illegal, then the enforceability, validity and legality of the remaining provisions will not in any way be affected or impaired, and such provision will be deemed to be restated to reflect the original intentions of the parties as nearly as possible in accordance with applicable law.

(e) *Attorney's Fees*: Attorney's fees shall be paid by the party incurring such fees.

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IN WITNESS WHEREOF, the parties hereto have executed this Performance Agreement as of the date first written above.

COLONNA'S SHIP YARD, INCORPORATED

By _____
Name: _____
Title: _____
Date: _____

CITY OF NORFOLK, VIRGINIA

By _____
Name: _____
Title: _____
Date: _____

ATTEST:

City Clerk

APPROVED AS TO CONTENTS:

Director, Department of Development

APPROVED AS TO FORM AND CORRECTNESS:

Assistant City Attorney

**ECONOMIC DEVELOPMENT
AUTHORITY OF THE CITY OF
NORFOLK**

By _____
Name: _____
Title: _____
Date: _____

APPROVED AS TO CONTENTS:

Executive Director, Economic Development
Authority of the City of Norfolk

APPROVED AS TO FORM AND CORRECTNESS:
